CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, March 1, 1999

Appeal No. AP-96-057

IN THE MATTER OF an appeal heard on December 1, 1998, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue dated April 9, 1996, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

CATHERINE ROOZEN **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Raynald Guay
Raynald Guay
Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
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UNOFFICIAL SUMMARY

Appeal No. AP-96-057

CATHERINE ROOZEN **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 67 of the *Customs Act* from a decision of the Deputy Minister of National Revenue regarding the classification of four 17-g cans of pepper spray purchased as a defence against dogs, bears and other animals. The goods in issue were classified as "[o]ffensive weapons" under Code 9965 of Schedule VII to the *Customs Tariff*. This code refers to the definition of "prohibited weapon" in section 84 of the *Criminal Code*, which, in turn, under paragraph (*e*), includes a weapon of any kind that is declared a prohibited weapon by order of the Governor in Council. The issue in this appeal is whether the goods in issue constitute devices that are declared prohibited weapons under *Prohibited Weapons Order, No. 1*.

HELD: The appeal is dismissed. The appellant's intention to use the goods in issue as a defence against animals when she walks her dogs is not relevant. Section 2 of *Prohibited Weapons Order, No. 1* includes devices designed to be used for the purpose, among other things, of incapacitating any person by the discharge of a spray, powder or other substance. As revealed by the label of the goods in issue, they constitute devices designed to be used for the above-noted purpose within the meaning of *Prohibited Weapons Order, No. 1*. The Tribunal is also of the view that the goods in issue constitute weapons within the meaning given to that word in section 2 of the *Criminal Code*. Consequently, they are prohibited weapons under the *Criminal Code* and, as such, offensive weapons within the meaning of the *Customs Tariff*, the importation of which is prohibited into Canada.

Places of Video Conference Hearing:	Hull, Quebec, and Calgary, Alberta
Date of Hearing:	December 1, 1998
Date of Decision:	March 1, 1999
Tribunal Members:	Pierre Gosselin, Presiding Member Raynald Guay, Member Peter F. Thalheimer, Member
Counsel for the Tribunal:	Gilles B. Legault
Clerks of the Tribunal:	Margaret Fisher and Anne Turcotte
Appearances:	Thomas Ross, for the appellant Jocelyn Sigouin, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-96-057

CATHERINE ROOZEN **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
RAYNALD GUAY, Member
PETER F. THALHEIMER, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] (the Act) from a decision of the Deputy Minister of National Revenue dated April 9, 1996. The hearing of this matter proceeded by way of video conference in Hull, Quebec, and Calgary, Alberta.

The goods in issue are four 17-g cans of pepper spray, sold under the trade name "Peppergard," which the appellant purchased in Ohio in 1994 as a defence against dogs, bears and other animals. The goods in issue were classified as "[o]ffensive weapons" under Code 9965 of Schedule VII to the *Customs Tariff*.[2] This code refers to the definition of "prohibited weapon" in section 84 of the *Criminal Code*,[3] which, in turn, under paragraph (*e*), includes a weapon of any kind that is declared a prohibited weapon by order of the Governor in Council. The issue in this appeal is whether the goods in issue constitute devices that are declared prohibited weapons under *Prohibited Weapons Order, No. 1*[4] (the Order). The facts of this case are not in dispute.

Section 2 of the Order reads as follows:

> Any device designed to be used for the purpose of injuring, immobilizing or otherwise incapacitating any person by the discharge therefrom of
> (*a*) tear gas, Mace or other gas, or
> (*b*) any liquid, spray, powder or other substance that is capable of injuring, immobilizing or otherwise incapacitating any person,
> is hereby declared to be a prohibited weapon.

Counsel for the appellant argued that the goods in issue were purchased by the appellant for protection against animals, not for use against other people nor for intimidating anyone. The goods in issue, counsel added, were classified as prohibited weapons mainly because of what is stated on their label. This, he suggested, is absurd, since the substance contained in the goods should be decisive, not their labelling. Referring to the Tribunal's decision in *Oriental Trading (MTL) Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise*,[5] counsel contended that the essential character of an item determines its tariff classification. He further argued that the use for which the goods in issue were designed is ambiguous and that this ambiguity should be resolved in favour of the appellant. Counsel also relied on the decision of

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. R.S.C. 1985, c. C-46.
4. C.R.C. 1978, c. 433.
5. Appeal Nos. AP-91-081 and AP-91-223, August 31, 1992, 10 T.T.R. 347.

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the Ontario Court of Appeal in *Regina* v. *Maciel*[6] to contend that the words "designed to be used" are themselves ambiguous and that a person is, thus, entitled to the benefit of whatever interpretation is most favourable. In addition, counsel relied on the Ontario Court of Appeal decision in *Regina* v. *Murray*[7] (hereinafter "*Murray 1985*") to argue that there is an objective test and a subjective test, that the objective test, in this case, is not conclusive and, therefore, that the subjective test, i.e. the appellant's intention to use the goods in issue against animals, must prevail. Counsel stated that the appellant does not quarrel that the goods in issue are capable of injuring another person. However, since the appellant has no intention of using it for any other purposes than for protection against animals, she must, consequently, be allowed to import the goods in issue. Alternatively, if the Tribunal were to conclude that the goods in issue are prohibited weapons, counsel argued that the appellant should be either entitled to return the goods to the United States or authorized to apply labels that would bring them within the law.

Counsel for the respondent argued that the appellant's intention regarding the use of the goods in issue is not a determinative factor. What is determinative, in counsel's view, is the evidence provided by the label of the goods in issue, which establishes that they were designed for use against people. In argument, counsel drew the Tribunal's attention on the following portions of the label:[8]

> Do not use your PEPPERGARD unit on an assailant who appears to be armed. Even though it may take only a few seconds for the PEPPERGARD formulation to take effect, an armed assailant might use his weapon during those few seconds.
>
> …
>
> Spray short bursts into the facial area of your assailant. If you are using PEPPERGARD to repel an attacker, continue to fire until the attacker is incapacitated…. Do not attempt to take the attacker into custody, you may be injured if you do. Contact the police when you are calmly away.

According to counsel for the respondent, the label shows clearly that the goods in issue are designed to be used against a person. Counsel stressed, in this regard, the use of the word "armed." Counsel also pointed out that the label uses the word "incapacitated," which is also used in the Order. Counsel added that the label only refers to animals in relation to testing the functioning of the goods in issue so as to prevent testing the products while an animal is in the vicinity.

In the Tribunal's view, the goods in issue constitute devices designed to be used for the purpose of incapacitating any person by the discharge of a spray, powder or other substance and are, therefore, prohibited weapons within the meaning of the Order. As pointed out by counsel for the respondent, the labelling of the goods in issue clearly supports this conclusion. The portions of the labelling that provide instructions on the use of the goods in issue state clearly that their purpose is to repel or incapacitate an assailant or attacker. Further, the label states that the product should continue to be sprayed into the facial area of the attacker until subdued. The labelling of the goods in issue makes clear the purpose for which they were designed and makes no mention of their use against dogs or other animals. The appellant's intention in acquiring the goods is not relevant.

As to the case law cited by counsel for the appellant, the Tribunal's decision in *Oriental Trading* does not support his contention that referring to the label of the goods in issue to classify them is absurd. The Tribunal is of the view that instructions on the label of imported goods and, consequently, the label itself are significant factors to consider in determining the essential character of those goods. Regarding the criminal law cases to which counsel referred, the decision in *Maciel* could have been relevant if there was an ambiguity in this appeal, but, in the Tribunal's view, there is none. Based on the decision of the Ontario

6. June 17, 1977, 35 C.C.C. (2d) 291.
7. January 28, 1985, 24 C.C.C. (3d) 568.
8. Exhibit B-1.

Court of Appeal analyzing the decisions made by the lower courts in *Maciel*, it is not so much the words "designed to be used" contained in paragraph 2(*a*) of *Prohibited Weapons Order, No. 2*[9] that were ambiguous, but rather these words when read in the context of the rest of that paragraph. There is no ambiguity here with the rest of the paragraph in the Order.

With respect to *Murray 1985* cited by counsel for the appellant, the Tribunal notes that the Ontario Court of Appeal dealt with the definition of the words "offensive weapon" or "weapon" as it existed then in section 2 of the *Criminal Code*. It is worth noting that the objective test mentioned by the Court relates to the words "designed to be used" contained in paragraph (*a*) of that definition. The definition was amended a first time in 1985, where the words "designed to be used" were removed, and again in 1991, when these words reappeared[10] (the latter definition being the one that applies in this case, given that it existed when the goods in issue were imported into Canada). Also in 1991, in a decision that neither of the parties mentioned, the same court that rendered the decision in *Murray 1985* discussed the effect of these amendments in *Regina* v. *Murray*[11] (hereinafter "*Murray 1991*"), a matter involving nunchaku sticks. The Court described the subjective test as "the intent of the user" and the objective test as "the intent of the manufacturer."[12] The Court also noted that the objective test was removed by the 1985 amendment mentioned earlier. On that basis and given, among other things, the innocent purpose of the accused when he acquired the nunchaku sticks, the Court pronounced a verdict of acquittal regarding their possession. The Court, however, stressed its relief that a new amendment to the definition of "weapon" in section 2 of the *Criminal Code*, i.e. the 1991 amendment referred to earlier, would be restoring the objective test. It is thus clear that, despite the different amendments brought to the definition of the word "weapon," the words "designed to be used" in the version that applies to this case represent the objective test. It is also clear that it is not necessary to consider the intent of the appellant, i.e. the subjective test, if the objective test is met.

That being said, both *Murray 1985* and *Murray 1991* stand for the proposition that the Tribunal must also be convinced that the goods in issue are weapons within the meaning given to that word in section 2 of the *Criminal Code*. This proposition is based on the then section 14 of the *Interpretation Act*,[13] which provided that the definition of any word in a statute applies to the use of that word throughout the statute unless a contrary intention appears. In the Court's view, the definition of "weapon" in section 2 applied to the word "weapon" used in the then paragraph 82(1)(*e*) of the *Criminal Code*,[14] which is the paragraph that allowed the prescription of prohibited weapons by Order in Council (now section 84). Thus, on the basis of these decisions, it appears that it is not enough to find that the goods in issue fall within the

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9. C.R.C. 1978, c. 434. The relevant portion of paragraph 2(*a*) of that order reads as follows: "(*a*) any instrument or device commonly known as "nunchaku" … designed to be used in connection with the practice of a system of self-defence such as karate."
10. Compare the relevant portion of the definition of "weapon" in R.S.C. 1970, c. C-34, s. 2, as amended, " 'offensive weapon' or 'weapon' means (*a*) anything that is designed to be used as a weapon, or (*b*) anything that a person uses or intends to use as a weapon, whether or not it is designed to be used as a weapon," with the definition in S.C. 1985, c. 19, s. 2, " 'weapon' means (*a*) anything used or intended for use in causing death or injury to persons whether designed for such purpose or not, or (*b*) anything used or intended for use for the purpose of threatening or intimidating any person," and its further amendment in S.C. 1991, c. 40, s. 1, " 'weapon' means (*a*) anything used, designed to be used or intended for use in causing death or injury to any person, or (*b*) anything used, designed to be used or intended for use for the purpose of threatening or intimidating any person." (Emphasis added)
11. June 14, 1991, *Regina* v. *Murray*, 65 C.C.C. (3d) 507.
12. *Ibid.* at 510.
13. R.S.C. 1970, c. I-23, now R.S.C. 1985, c. I-21, s. 15.
14. R.S.C. 1970, c. C-34, as amended by S.C. 1976-77, c. 53, s. 3, now R.S.C. 1985, c. C-46, s. 84(1), paragraph (*e*) of the definition of "prohibited weapon," which reads as follows: "a weapon of any kind … that is declared by order of the Governor in Council to be a prohibited weapon." (Emphasis added)

prescription of the Order, but that the Tribunal must also decide whether they are weapons and, as such, whether they are designed to be used for causing injury to any person within the meaning of paragraph (*a*) of the definition of "weapon" in section 2 of the *Criminal Code*.[15]

The Tribunal has no difficulty concluding that the goods in issue are, in fact, weapons. The Tribunal is satisfied, in this regard, that devices, such as the goods in issue, that are designed to incapacitate, even temporarily, a person are, in its view, also designed to cause some form or level of injury to a person, even if the resulting injury is not permanent. The fact that the label does not state that the goods in issue are aimed at or designed for injuring persons is not critical. In the Tribunal's view, that the goods in issue are designed to be used for causing injury to a person is a logical conclusion that follows its determination that "Peppergard" can incapacitate a person. With respect to the notion of injury, the Tribunal notes that counsel for the appellant admits that the goods in issue are capable of injuring a person. The label of the goods in issue also provides first aid instructions and cautions against first or second degree burns, severe skin irritation, depigmentation or other skin injury that can result from their use. The Tribunal can reasonably draw from these cautions another indication of the use for which "Peppergard" is designed. Consequently, the Tribunal is of the view that the goods in issue are devices contemplated by the Order and that they are weapons within the meaning of that word in paragraph (*a*) of the definition provided in section 2 of the *Criminal Code*. Again, the purpose for which the goods in issue were acquired is not relevant, once this objective test is met.

Finally, the Tribunal has no jurisdiction regarding the disposal of the goods in issue. This is a matter to be dealt with by the respondent or the courts, if the appellant wishes to pursue this matter. The Tribunal's jurisdiction in this case is limited by section 67 of the Act and by the nature of the appeal itself, which relates to a re-determination made by the respondent with respect to the classification of the goods.

For all these reasons, the appeal is dismissed. The goods in issue are devices designed to be used for the purpose, among other things, of incapacitating any person by the discharge of a spray, powder or other substance covered by section 2 of the Order. They also constitute weapons within the meaning given to that word in section 2 of the *Criminal Code*. Consequently, they are prohibited weapons under the *Criminal Code* and, as such, offensive weapons within the meaning of Code 9965 of Schedule VII to the *Customs Tariff*, the importation of which is prohibited into Canada.

Pierre Gosselin
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15. See the last definition in note 10.